United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2042

B p/s

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

74-2042

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UNITED STATES OF AMERICA
ex rel. WILLIAM WOODEN,
Petitioner-Appellant,

Docket No. 74-2042

-against-

LEON J. VINCENT, Superintendent
Green Haven Correctional Facility,
Stormville, New York,
Respondent-Appellee.

----------X

REPLY BRIEF

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Harvey W. Spizz
Malachy T. Manon
Perry S. Reich (Legal Intern)
on the Brief

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PRELIMINARY STATEMENT

The State in its brief has failed to respond to petitioner's arguments, has misstated petitioner's contentions, and in doing so has misstated record fact. Accordingly, a reply is both warranted and necessary.

POINT I

THE STATE HAS FAILED TO RESPOND TO PETITIONER'S ARGUMENT ON THE INADMISSIBILITY OF THE POST-INDICTMENT CONFESSIONS AND HAS MISSTATED PETITIONER'S ARGUMENT.

The petitioner argued in the District Court and is arguing here that once an indictment has come down a defendant can not be interrogated in the absence of counsel, without an intelligent, voluntary and knowing waiver tested by the at-trial standard of waiver in Von Moltke v. Gillies, 332 U.S. 708 (1948). Alternatively, and at the minimum, such a waiver must be made with a knowledge of the "stark legal facts" as stated by Judge Frankel in United States ex rel Lopez v. Zelker, 344 F. Supp. 1050 (S.D.N.Y.) aff'd mem. 465 F. 2d 1405 (2d Cir.), cert. denied 409 U.S. 1049 (1972). Only if both these contentions are rejected need this Court evaluate the considerable authority for a per se rule invalidating post-indictment confessions in the absence of counsel. Massiah v. United States, 377 U.S. 201 (1964); McLeod v. Ohio, 381 U.S. 356 (1965); and Kirby v. Illinois, 406 U.S. 682 (1972).

The State does not make any argument as to the two higher standards, -- per se and Von Moltke-- but simply states that they are not proper standards. As to the lower standard of "stark legal facts," the State fails to respond to petitioner's key point that not knowing that he had been indicted for felony-murder he was incapable of making an intelligent waiver of his right to counsel. There is no rationale distinction between the facts now before this Court in this case, and those that were before this Court and U.S. District Judge Frankel in the Lopez case. As Judge Frankel wrote (344 F. Supp. at 1055), Lopez knew that he was being held in regard to a shooting, but was uninformed as to the "stark legal fact" of

his indictment for murder when he made admissions which he thought would lead to a future indictment for manslaughter. Wooden likewise did not understand the legal significance of his admissions which, intended as exculpation, in fact effectively eliminated any possible resort to the statutory affirmative defense to Felony Murder. We are mystified by the State's attempt (at p. 34) to argue from Stovall v. Denno, 388 U.S. 293 (1967) since no issue of retroactivity is here involved, and we assume this Court will ignore the State's frivolous suggestion (at p. 34) that a denial of certiorari is a disposition on the merits. We also point out that, to the extent the State's argument is based upon United States v. Crisp, 435 F. 2d 354 (7th Cir., 1970), it fails to draw this Court's attention to the Seventh Circuit's own subsequent withdrawal from the position there taken because of the intervening Kirby decision. See United States v. Durham, 475 F. 2d 208 (7th Cir., 1973).

POINT II

THE ADMISSION INTO EVIDENCE OF WOODEN'S POST-INDICTMENT CONFESSIONS WAS NOT HARMLESS ERROR BECAUSE WITHOUT THEM THERE WAS NOT SUFFICIENT CORROBORATIVE EVIDENCE TO PERMIT USE OF THE ACCOMPLICE TESTIMONY AND THE ACCOMPLICE TESTIMONY WAS AN ESSENTIAL PART OF THE PEOPLE'S CASE.

Apparently recognizing that the admission into evidence of the post-indictment confessions was constitutional error, the State argues, as its main point, that the error was harmless. Such a tactic should be looked upon with a critical eye by this court, particularly where the errors considered to be "harmless" are the admissions of confessions in a murder case.

A. The other Evidence was Insufficient.

1. Testimony of Smith, Edwards, Mack, Jones and Greene.

Leitha Smith and Bonnie Edwards, under indictment for perjury, testified that the day before the crime Wooden and the co-defendants were speaking about a "job." Betty Mack placed the defendant in the company of the co-defendants the evening before the crime. Mary Jones testified to the defendant and the co-defendants chipping in for liquor a few hours after the crime. Dorothy Greene testified as to an ambiguous admission of the defendant a few weeks after the crime.

As for the State's contention that "petitioner had confessed his participation in the incident" to Dorothy Greene (Appellee's brief, p. 29),

we direct the Court's attention to pages 27 and 32 of the same brief which directly conflict with this assertion. As indicated in Appellant's brief, pp. 55-56, and in the testimony as well as at pages 27 and 32 of the Appellee's brief, Greene only testified that Wooden said that "he had shot someone."

All this evidence, standing alone, would not have been sufficient to convict petitioner. None of this other evidence directly implicated Wooden in the crime.

2. The Admissions to Patrolmen Sefton and Gunter.

The spontaneous admissions to Sefton and Gunter uttered upon Wooden's arrest for an unrelated burglary made no reference to any particular crime or event, and there was no "context" that would permit a jury to interpret them as relating to the crime at issue.

On page 3 of the State's brief it is indicated that "Wooden, upon his arrest, volunteered that he had participated in the robbery but denied he did the shooting." Similarly on page 29 of the State's brief it is indicated that Wooden had volunteered essentially the same information that was in his later confession to Guido, to Patrolman Sefton upon his arrest on an unrelated burglary charge. Finally, on page 29 of the Appellee's brief Wooden's statements to Patrolman Sefton are given, albeit they are placed in a false context:

Petitioner knew he was wanted for the robbery at the railroad station and after the Miranda warning spontaneously spoke:

> "With that Wooden said, 'I was going to give myself up. I was in Florida, down at the track'. He said, 'I didn't shoot him. I had the knife. I can prove it. It's in my jacket behind the lockers in the building '." (230)
>
> [Appellee's Brief at pp. 29-30].

The three references to the admissions to Sefton are highly misleading. It is clear from looking at the words of Wooden that he never admitted to participating in "the robbery" as stated by the State on page 3; that what he said was certainly not "essentially the same information" that was given in the confession to Guido; and that to place the words "I didn't shoot him. I had the knife" after the phrase "petitioner knew he was wanted for the robbery at the railroad station" is to misleadingly create a context that never existed at the time the statements were made. The misleading nature of the State's handling of the Sefton admissions is particularly important in that the state relies heavily on the Sefton admissions in order to argue that the admission into evidence of the post-indictment confessions was harmless error. Thus, these statements, even if they were admissible as relevant, would not lend the needed support to the above evidence from Smith et al.

3. The Testimony of the Accomplice, Banks.

The strongest evidence against Wooden other than the post-indictment confessions was the testimony of the accomplice Banks.* Under New York law, however, his testimony had to be corroborated and the only source of that corroboration was the confessions.** Even taken together the testimony of Mack, Smith and Edwards was insufficient to corroborate under People v. Kress, 284 N.Y. 452, 460 (1940) (discussed

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*Banks drove to Mineola, parked several blocks from the railroad station, petitioner and two others got out of the car, and Banks went to sleep. (Appellee's brief, p. 31). Banks did not witness the robbery, let alone any shooting. For all Banks knew Wooden could have waited outside the car. Of course, Banks had been given a plea bargain and was expecting consideration for his testimony; and much could have been made of this to the jury if the defendant had counsel. It is well established that an accomplice's testimony is suspect and must be viewed with "great care." United States v. Phillips, 426 F. 2d 1069 (2nd Cir.), cert. denied, 400 U.S. 843 (1970); United States v. Corallo, 413 F. 2d 1306 (2nd Cir.) cert. denied, 396 U.S. 958 (1969

**The State, in a footnote, claims that petitioner is arguing that corroboration is constitutionally necessary. To the contrary, we are merely applying the "harmless error" test and in doing such we look to the probable result without the confession. In Stein v. People of the State of New York, 346 U.S. 156, 164 (1953) the Supreme Court in applying a "harmless error" test to a challenged confession, noted the New York Rule requiring corroboration and followed that rule finding sufficient corroboration for the evidence which required it.

on p. 55 of Appellant's main brief) since it was only "evidence of mere association of [the] defendant at the time antecedent to its commission" and not "actual participation in the crime itself." In People v. Leo, 23 N.Y. 2d 556, 297 N.Y.S. 2d 937, cert. denied, 395 U.S. 962 (1969) and People v. Brown, 30 App. Div. 2d 279, 291 N.Y.S. 2d 573 (3rd Dept. 1968), cases cited by the State, there was non-accomplice testimony placing the defendants at the scene of the crime and with the fruits of the crime. Such evidence is quite different from the vague and circumstantial evidence of Mack, Smith, Edwards and Jones.

The alleged admissions to Sefton, Gunter and Greene do not provide the necessary corroboration because they do not "tend to connect" petitioner with the crime for which he was on trial. See People v. Buchalter, 289 N.Y. 181, 213, 45 N.E. 2d 225 aff'd 319 U.S. 427 (1943); People v. Peller, 291 N.Y. 438, 52 N.E. 2d 939 (1943); People v. Gioia, 286 App. Div. 528, 145 N.Y.S. 2d 495 (1st Dept. 1955) (dicta, conviction reversed on other issues), all involving admissions either placing defendant at the scene or directly connecting him with the crime. If there were no confessions and thus uncorroborated accomplice testimony, the case would have had to rest on the ambiguous evidence mentioned above in paragraph "A" (1) and (2).

B. Admission of Confession was not Harmless Error.

Other than the post-indictment confessions there was no direct evidence implicating Wooden in the crime. The testimony of the witnesses Smith, Mack, Edwards, Jones and Greene was vague and circumstantial. The admissions made to Sefton and Gunter were highly ambiguous. It is true that these various pieces of circumstantial evidence would be helpful in convicting a confessing defendant and resolving any doubts that there might have been in the jury's mind as to his participation in the crime. However, without the confessions all of these circumstantial details would not have been adequate to sustain a prima facie case, let alone constitute proof beyond a reasonable doubt. Adding Bank's testimony to these various circumstantial details might have made the case able to withstand the motion to dismiss at the end of the People's case, but as indicated in our main brief, Bank's testimony could not have been admitted without the corroborative post-indictment confessions. Therefore in view of all of the evidence adduced at the trial it cannot be said beyond a reasonable doubt that admission of Wooden's post-indictment confessions was harmless error and did not contribute to the ultimate verdict. Despite the State's footnote on page 32 of its brief, the weakness of the State's case against Wooden without Wooden's confessions was well stated by the District Attorney in its brief to the New York State Court of Appeals, and its arguments there (reproduced in appellant's appendix) stands as a refutation to the "harmless

error" arguments of the State which have surfaced for the first time in the federal courts.

The State's main claim is that petitioner's statements were exculpatory and irrelevant to petitioner's conviction for manslaughter. It then concludes that it cannot be disputed that the jury relied upon other evidence for that conviction. This proceeds from an absolutely erroneous view of the applicable law, the famous "accomplice rule." It is the law in New York, Penal Law Section 20.00 (McKinney 1967), as well as every other jurisdiction, that counsel is familiar with, see Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689, 702 et seq. (1930); 18 U.S.C. Section 2 (1970 ed.), that a person may be convicted of a crime which charges him with commission of an act although the evidence discloses that he was not engaged in the act but was an accomplice. In fact, the cases in New York are legion where a defendant has been convicted of common law murder despite the fact that the defendant was not the actual slayer. See e.g. People v. Michalow, 229 N.Y. 325, 128 N.E. 228 (1920). In fact, even a "lookout" may be convicted of the underlying act. People v. Capobianco, 18 Misc. 2d 217, 192 N.Y.S. 2d 308 (Schnectady Co. Ct. 1959). More important, the jury was instructed that it need not find that Wooden shot anyone to return a guilty verdict on that count (807).

Milton v. Wainwright, 407 U.S. 371 (1972) is inapposite since there were three full unchallenged confessions as well as substantial direct evidence implicating the defendant in the crime. These unchallenged confessions were direct evidence implicating the defendant in the crime:

they were direct admissions of guilt and corroborated almost every element of the crime. United States ex rel Moore v. Follette, 425 F. 2d 925 (2d Cir. 1970), an "exceedingly rare case" in the words of Judge Friendly, is likewise inapposite. There the testimony of a corroborating witness "corroborated [an untainted confession] and covered every element of the crime." 425 F. 2d at 928. Moreover, stolen property from the crime was found in the defendant's possession.

More in point is United States v. Castello, 426 F. 2d 905 (2d Cir. 1970). There Judge Pollack, writing for the Second Circuit, looked at the status of the case without the challenged confession. One witness testified that Castello had confided in him that he "had planned to rob a bank", "the Liberty Avenue" bank. Another witness testified that he saw the gun involved in the robbery in Castello's possession. Judge Pollack noted:

> "Becker and Held were witnesses of doubtful veracity; both were convicted felons and expected consideration for their testimony. Even though there was independent evidence of appellant's connection with the crime, Harrington [v. California, 395 U.S. 250 (1969)] teaches that this is not enough."
>
> 425 F. 2d at 907

In short, in the absence of the confessions, the entire case against Wooden was "woven from circumstantial evidence", and either weak or ambiguous at that, Harrington v. California, 395 U.S. 250 (1969), there being absolutely no eyewitness (except the Banks and Guido hearsay) or identification testimony. See U.S. ex rel Hayes v. McKendrick, 487 F. 2d 152 (2d Cir. 1973). The other admissions had no corroborative or probative

effect since they in no way connected petitioner to the crime. Likewise, it must be remembered that no witness, other than Banks, could identify Wooden as being in any way connected with the crime. This was a major weakness in the prosecution's case. See Bumper v. North Carolina, 391 U.S. 543, 550, n.16 (1968); See also Mr. Justice Harlan's concurring opinion id at 553-54. There remains at the very least, "a reasonable possibility that the error complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 23 (1968). Petitioner submits that harmless error is no barrier to this Court's determination on the merits of this grave constitutional issue which divided the New York Court of Appeals (4-3).

POINT III

THE STATE HAS MISSTATED APPELLANT'S ARGUMENT AS TO FORCED PRO SE REPRESENTATION AT THE MURDER TRIAL, HAS FRAMED THE ISSUE IN TERMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND HAS FAILED TO RESPOND TO APPELLANT'S ARGUMENTS.

A. The State has failed to address the forced Pro Se Representation Issue

Appellant argues that his complaints as to his lawyer's preparedness required an inquiry by the Trial Court. The Court failed to make inquiry, said it had no power to substitute counsel, and in effect forced Wooden to proceed pro se. The State does not respond to the Court's failure to inquire, but instead points to the good job that Wooden's lawyer had done. The issue is not ineffective assistance of counsel, and thus the State completely misses the point.

On page 10 of the State's brief the State Trial Judge is indicated to have stated his understanding of the law saying that it did not allow an indigent defendant to choose a particular lawyer. The Judge on numerous occasions had indicated that he did not have the power to assign another lawyer to the defendant. This, of course, was not the case, and perhaps this is one of the reasons that the Court erred in forcing Wooden to proceed pro se.

On page 37 of the State's brief, it is indicated that petitioner had "ample opportunity" to establish his allegation that counsel was unprepared and thereby justify his request for a substitution. This is not the case inasmuch as the Court never made an inquiry into the reasons for petitioner's concern. In fact, based upon the facts and admissions that gradually crept into the record, the Court should have concluded that defendant justifiably lacked confidence in his

attorney, that as a result the attorney-client relationship had been irretrievably lost, and the Court should then have offered to appoint new counsel selected by the Court. The question is not whether counsel was so unprepared as to raise an effective assistance issue, but whether the Court should have conducted an inquiry into petitioner's uncontested and admitted allegations; and since it failed to do so, it must be considered that the pro se representation of defendant was a forced one.

B. The State fails to consider what effect counsel's lack of preparation had on appellant's good faith loss of confidence in his lawyer. It instead looks to how prepared counsel was, in terms of an ineffective assistance of counsel argument.

The State attempts to show that Cohn was well-prepared for trial by pointing to Cohn's attendance at the Hill-Banks hearings and at Wooden's Huntley hearing. Cohn was present "for a while" during the Hill identification hearings, and the testimony was severly limited in its scope because of the nature of the hearing, and for all the Court knows, the only part counsel observed was police testimony as to the physical arrangements of the lineups.

Based upon what petitioner's counsel knows about the Banks confession hearing from the Appellate Division brief in that case, it was largely concerned with Banks' degree of intoxication at interrogation and whether he had been plied with liquor.

Cohn's creditable representation of Wooden at the Huntley hearing was ancient history: Wooden was justifiably concerned about Cohn not keeping up with recent events, such as the Banks deal and the perjury indictments. We are not concerned with ineffectiveness of counsel as the State keeps characterizing petitioner's arguments, but rather the issue is to what extent was Wooden justified in lacking confidence in his counsel to the extent that his statements

concerning counsel's preparedness justified inquiry by the Trial Court.

Who among us, in similar circumstances, would not have asked for other counsel, or paid for it if we could? And if we could pay, would not the Trial Court have allowed us a substitution on these facts.

C. The cases cited by the State on this point are inapposite.

United States v. Tortora [incorrectly cited as Fortura in respondent's brief], 464 F. 2d 1202 (2d Cir.), cert. denied 409 U.S. 980 (1972) does not support respondent's argument of "willful" rejection of counsel. The Court there held that a defendant given three months to obtain counsel and who had done nothing to get counsel could not complain of lack of counsel. Moreover in Tortora, the defendant had two lawyers representing him. (464 F. 2d at 1210). A reading of Tortora fails to disclose the slightest resemblance to the facts in this case. The other cases cited by the State with regard to the forced waiver issue are similarly inapposite. They involved failure to give reasons for requesting other counsel (United States v. Gutterman, 147 F. 2d 540 (2d Cir. 1945), United States ex rel Baskerville v. Deegan, 428 F. 2d 714 (2d Cir. 1970), cert. denied 400 U.S. 928 (1970) (erroneously cited by the State at 427 F. 2d)), giving a week's adjournment to obtain new counsel despite no reasons having been given for dissatisfaction with counsel (United States ex rel Jackson v. Follette, 425 F. 2d 257 (2d Cir. 1970), and continuances (Ungar v. Sarafite, 376 U.S. 575 (1964) (incorrectly spelled Lenzar in the State's brief).

D. The fact that the case might have been "exceptionally strong" is irrelevant.

Appellee cites no case which holds that an indigent waiver must be measured in light of the "strength or weakness" of the People's case. United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972) indicates that the claim is

weighed against the truth or falsity of the defendant's claims. See also United States v. Woods, 487 F. 2d 1218 (5th Cir. 1973); cf McQueen v. Swenson, 498 F. 2d 687 (6th Cir. 1974). There is no question that Wooden's dissatisfaction was and is warranted. Beasley v. United States, 491 F. 2d 687 (6th Cir. 1974); United States v. DeCoster 487 F. 2d 1197 (D.C. Cir. 1973).

Research fails to disclose any case where the "farce and mockery of justice" test has been applied in a "waiver" case. Indeed, this Court has assumed that a "farce" results when a defendant defends himself. United States v. Calabro, 467 F. 2d 973, 985-87 (2d Cir. 1972).

In short, petitioner felt "forced" to defend himself in a murder case when his lead counsel was unprepared. There was no inquiry into petitioner's allegations and the result was a one-sided trial marked with substantial error. Petitioner only seeks a fair trial with counsel as guaranteed to him by the United States Constitution. We pray that this Court give it to him.

Respectfully Submitted,

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C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket # 74-2042
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UNITED STATES OF AMERICA
ex. rel. WILLIAM WOODEN,

Petitioner-Appellant,

against

LEON J. VINCENT, Superintendent
Green Haven Correctional Facility,
Stormville, New York,

Respondent-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NASSAU *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
27c Old Mill Court, Rockville Centre, New York 11570

That on the 14th *day of* October, *19* 74 *deponent served the annexed*
REPLY BRIEF
on The Attorney General of the State of New York-Att: Arlene Silverman, E
Assistant Att. General
attorney(s) for Respondent-Appellee
in this action at Two World Trade Center, New York, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office ~~&~~ official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 14th *day of* October, *19* 74

Geraldine Moore

The name signed must be printed beneath
GERALDINE MOORE

[illegible] GONZALEZ
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1976

Amparo Gonzalez

C 321—Affirmation of Service by Mail.
Affidavit of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated this day of 19

.....
The name signed must be printed beneath

Attorney at Law